STATEMENT OF THE CASE

Petitioners (Texas citizens and residents) initially brought this wrongful death suit in the state District Court of Galveston County against Veronica Crockett, deceased,'s physician, William Peterek, M.D. (Texas citizen and resident), and the Tobacco Defendants. Veronica Crockett's death from lung cancer was jointly caused by the defective cigarettes manufactured by the Tobacco Defendants and the delayed diagnoses by the Healthcare Defendants. Despite the existence of complete diversity, the Tobacco Defendants removed the case to federal court alleging the claims against the state residents, William Peterek, M.D. and his practice ("Healthcare Defendants"), were fraudulently joined. The District Court disagreed and remanded the case to State Court. *See* App. B.

On remand, over Petitioners objections, the State Court judge severed the claims against the Tobacco Defendants. Despite well-established law prohibiting removal under these circumstances, that same day, Defendants again removed the case to federal court citing diversity as the basis for jurisdiction. Together with the notice of removal, the Tobacco Defendants filed a motion for judgment on the pleadings.

Simultaneous with the filing of the removal by the Tobacco Defendants, Petitioners filed a writ of injunction in the First District Court of Appeals of Texas seeking to enjoin any

further filings by the Tobacco Defendants, specifically including removal, until Petitioners were able to seek appellate review of the state court's severance decision. However, since the parties were no longer in the state court system, the First District Court of Appeals dismissed this writ as moot such that the Tobacco Defendants removal prevented Plaintiffs from obtaining appellate review by the Texas state courts. Petitioners again sought remand based upon a lack of diversity since the voluntary-involuntary rule prevented removal in these circumstances.

Rather than determine the jurisdictional issues, the District Court improperly determined that it would hear motions in the order received. The District Court then granted the Tobacco Defendants motion for judgment on the pleadings and dismissed Petitioners claims. *See* App. B. Petitioners appealed to the Fifth Circuit Court of Appeals pursuant to 28 U.S. C. § 1291.

The Fifth Circuit panel appropriately determined that fraudulent joinder was not subject to appellate review pursuant to 28 U.S.C. § 1447(d). Despite this being the only recognized exception to application of the voluntary-involuntary rule, the court of appeals nonetheless found federal diversity jurisdiction by carving out another exception, that of improper joinder. Based upon their determination that jurisdiction was proper, the

court of appeals affirmed the district court's judgment. Petitioners filed a petition for rehearing en banc and a petition for panel rehearing but those petitions were denied.

REASONS FOR GRANTING OF THE PETITION

This Court should grant Crockett's petition for writ of certiorari because the expansion of federal diversity jurisdiction by the Fifth Circuit's creation of a new exception to the voluntary-involuntary rule, improper joinder in addition to fraudulent joinder, represents a significant departure from the accepted and usual course of judicial proceedings and decisions of this Court. This new improper joinder exception to the voluntary-involuntary rule relaxes the requirements placed on a party seeking removal to a federal forum, will result in an increase in cases in the federal system and has the practical effect of nullifying the voluntary-involuntary rule.

The Fifth Circuit's expansion of diversity jurisdiction through creation of an improper joinder exception to the voluntary-involuntary rule additionally violates principles of federalism, is against public policy and conflicts with the Seventh and Eleventh Circuit Court of Appeal's recognition of fraudulent joinder as the sole exception to the voluntary-involuntary rule. This Court's grant of Crockett's petition for writ of certiorari is further warranted to resolve the conflict on the important issue of the existence of federal diversity

jurisdiction.

I. The Fifth Circuit's Decision Conflicts with This Court's Decisions by Improperly Expanding Federal Diversity Jurisdiction

In stark contrast to the general jurisdiction of state courts, federal courts are courts of limited jurisdiction specifically marked out by Congress. *Exxon Mobile Corp. v Allapattah,* 125 S. Ct. 2611, 2616 (2005); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Where the basis for the federal court's jurisdiction is diversity of citizenship, complete diversity between the parties must exist. *See Caterpillar v Lewis*, 519 U.S. 61, 68 (1996) *citing Strawbridge v. Curtiss*, 7 U.S. 267 (1806) ("this Court construed the original Judiciary Act's diversity provision to require complete diversity of citizenship."). Moreover, the determination of complete diversity is made at the time the suit is filed. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003) ("It is well settled...that federal diversity jurisdiction depends on the citizenship of the parties at the time suit is filed.") This rule requiring the existence of diversity at the time a plaintiff commences an action is equally applicable to cases initially brought in the federal court system as well as those removed to the federal courts based on diversity jurisdiction. *Great Northern Ry. v. Alexander,* 246 U.S. 276 (1918); *Keating v. Shell Chemical Co.*, 610 F.2d 328 (5th Cir. 1980).

Courts must narrowly construe the diversity statutes so as to avoid expanding federal jurisdiction. *Kokkonen*, 511 U.S. at 377 *citing American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). Consistent with this narrow interpretation of diversity jurisdiction, cases may only be removed to federal court premised upon diversity jurisdiction where diversity exists in the initial pleadings or is later created by a voluntary act of the plaintiff dismissing the non-diverse defendant within one year of the initial filing of the lawsuit. 28 U.S.C. § 1446(b); *Alabama Great Southern Ry. v. Thompson,* 200 U.S. 206 (1906); *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 546 (5th Cir. 1967). This judicially created rule mandating that only a voluntary act of the plaintiff may create diversity where it did not initially exist, known as the voluntary-involuntary rule, has been in effect in the federal system since 1898. *See Powers v. Chesapeake & O. Ry. Co.*, 169 U.S. 92 (1898). This rule prevents a federal court from exercising jurisdiction over a case where diversity is created by the removal of a non-diverse defendant over the objections of the plaintiff. *Id.*

Although fraudulent joinder is a recognized exception to the voluntary-involuntary rule, just as it is to the requirement that diversity exist in general, by recognizing improper joinder as an exception to the voluntary-involuntary rule, the panel opinion of the Fifth Circuit created a new much broader exception that expands diversity jurisdiction and effectively ignores the mandates of this Court that a presumption against

federal jurisdiction exist. *Kokkonen*, 511 U.S. at 378 ("It is to be presumed that a cause lies outside this limited jurisdiction.")

A. The Improper Joinder Exception Recognized by the Fifth Circuit Relaxes the Requirements Placed on a Party Seeking Removal to a Federal Forum

Fraudulent joinder occurs only where there is either outright fraud in the plaintiffs' jurisdictional pleadings or where there is no chance a plaintiff can establish a cause of action against the non-diverse defendant. *See Insigna v. LaBella*, 845 F.2d 249, 254 (11th Cir.1988); *see also B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981). In contrast, improper joinder, or misjoinder, can occur in a much wider set of circumstances when a court determines, for one reason or another, the joinder of multiple defendants does not satisfy the requirements of Federal Rule of Civil Procedure 19 (joinder of necessary parties) or Federal Rule of Civil Procedure 20 (permissive joinder).[1] For example, where a plaintiff initially

---

[1]Petitioners deny joinder of the Healthcare Defendants was improper. The defective cigarettes of the Tobacco Defendants and the failure to timely diagnose cancer by the Healthcare Defendants combined to cause the death of Veronica Faye Crockett. In order to afford Petitioners complete relief, it was necessary to join these Defendants in one action. Additionally, the

brings suit against two parties jointly and severally but "misconceived his cause of action and had no right to prosecute the defendants jointly," the Fifth Circuit's newly fashioned exception would render this case removable despite this Court's prior decision that this exact case was not removable where the defendants were joined in good faith. *Chicago, Rock Island & Pacific Ry. Co. v. Dowell*, 299 U.S. 102 (1913); *see also Rice v. Sunrise Express, Inc.*, 209 F.3d 1008 (7th Cir. 2000) (Misjoinder of one defendant sued as a successor corporation occurred in a case involving claims arising from the exact same transaction brought against three corporations with two of them being successor corporations. There was no allegation of fraud in the joinder of any of the defendants.); *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996) (recognizing distinction between misjoinder and fraudulent joinder) *abrogated on other grounds by Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000).

In recognizing that fraudulent joinder had already been decided against the Tobacco Defendants by the District Court in an earlier remand order which was not reviewable pursuant to 28 U.S.C. § 1447(d) and "is no longer an issue in the case," the Fifth Circuit's decision expressly recognizes that it has

---

claims arose out of one continuous transaction, involved common questions of fact and were made jointly, severally or in the alternative.

expanded diversity jurisdiction which is in direct contravention of the mandates of this Court and Congress. *Kokkonen*, 511 U.S. at 377. This new exception removes the heavy burden this Court placed on defendants seeking a federal forum of establishing that joinder of the non-diverse defendant was fraudulent and paves the way for federal courts to take jurisdiction over an ever increasing number of disputes. *Illinois Central R.R. Co. v. Sheegog*, 215 U.S. 308, 316 (1909).

B. The Fifth Circuit's Newly Created Improper Joinder Exception to the Voluntary-Involuntary Rule Effectively Nullifies the Rule

Recognizing improper joinder, in addition to fraudulent joinder, as an exception to the voluntary-involuntary rule creates an exception that could swallow the rule entirely. In virtually every instance where a state court enters an order dismissing a non-diverse defendant, a logical argument could be made that the non-diverse defendant was improperly joined. When a state court removes a non-diverse defendant through the granting of a motion for directed verdict, it could certainly be found that the non-diverse defendant against whom a case could not be made was improperly joined. Under the Fifth Circuit's new exception, the diverse defendant could then remove the case to federal court even at this late stage resulting in an inordinate waste of judicial resources. This Court's prior

holding that the voluntary-involuntary rule prevented removal in this exact scenario illustrates problems that will be encountered if the Fifth Circuit's decision is allowed to stand. *See Lathrop, Shea & Henwood Co. v. Interior Constr. & Improvement Co.*, 215 U.S. 246, 250 (1909) (finding the granting of a directed verdict dismissing non-diverse defendant did not permit removal to federal court based upon diversity); *see also Weems v. Louis Dreyfus Corp.*, 380 F.2d 545 (5th Cir. 1967) (finding the granting of a directed verdict in favor of resident defendant did not permit removal to federal court).

Similarly, where a non-diverse defendant is granted summary judgment, their joinder could be said to be improper such that, under this new exception, removal to federal court would be permitted despite clear precedent holding otherwise. *See In re: Iowa Manufacturing Co.*, 747 F.2d 462, 464 (8th Cir. 1984) (holding summary judgment did not permit removal because of application of the voluntary-involuntary rule). As these examples demonstrate, the Fifth Circuit's newly formed improper joinder exception completely swallows the voluntary-involuntary rule and nullifies over a hundred years of legal precedent. Even where courts continue to recognize the voluntary-involuntary rule, application of the Fifth Circuit's new exception will create confusion and conflict.

In contrast to the Fifth Circuit's new exception, the long standing rule of this Court that improper joinder without fraud

will not create diversity jurisdiction and is not a valid basis for removal, even when the non-diverse defendant was removed from the case based upon its improper joinder, gives meaning to the voluntary-involuntary rule. *Chicago, Rock Island & Pacific Ry. Co. v. Dowell*, 299 U.S. 102 (1913); *see also Power v. Norfolk & Western Ry. Co.*, 778 F. Supp. 468, 469 (E.D. Mo. 1991) ("Mere improper joinder is not equivalent to fraudulent joinder and thus is not grounds for removal.")

By fashioning a new exception to application of the voluntary-involuntary rule, the Fifth Circuit Panel took action outside the statutory subject-matter jurisdiction and impermissibly expanded federal diversity jurisdiction. As this court has previously held, judicial action expanding federal subject matter jurisdiction violates the fundamental constitutional precept of limited federal power. *Kokkonen*, 511 U.S. at 377. This expansion of federal jurisdiction and abrogation of the voluntary-involuntary rule warrants correction by this Court.

II. The Fifth Circuit's Expansion of Diversity Jurisdiction Violates Principles of Federalism and is Against Public Policy

Just as Chief Justice Marshall wrote in 1821 that the Supreme Court of the United States should not "usurp that

which is not given" and take jurisdiction where it did not exist, neither should any other federal court take jurisdiction over a matter not properly before it and usurp the jurisdiction of the state courts. *Cohens v. Virginia*, 6 Wheat. 264, 404 (1821). Yet, this is precisely what the Fifth Circuit did when it expanded federal diversity jurisdiction with the creation of a new exception to application of the voluntary-involuntary rule in order to render judgment against Petitioners.

The general rule is that "[a] suit commenced in a state court must remain there [unless and] until cause is shown" to permit its removal to federal court. *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199, 201 (1877) *superseded by statute on other grounds Franchise Tax Bd v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). This general rule protects the right of plaintiffs to choose the forum for their claims as well as protects fundamental principles of federalism. *Alexander*, 246 U.S. 281-82 ("the plaintiff may, by the allegations of his complaint, determine the status with respect to removability of a case"). The voluntary-involuntary rule serves these same functions. *Poulos v. NAAS Foods, Inc.*, 959 F.2d 69, 72 (7th Cir. 1992) ("Allowing removal only when the plaintiff voluntarily dismisses a defendant ensures that the plaintiff will not be forced out of state court without his consent.") As this Court has recognized, the limitations on subject matter jurisdiction ensure federal courts remain within the limits proscribed by the Constitution and Congress and

allow the federal and state systems to operate in cooperation. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583-586 (1999); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("Subject-matter jurisdiction, then, is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign"). When federal courts exercise jurisdiction over disputes that should be determined in the state court systems, federalism principles are not only frustrated, they are completely thwarted.

Federal courts are not free to fashion new rules on a whim in order to find the existence of subject matter jurisdiction. *Moore v. Mobil Oil Corp.*, 904 F. Supp. 587, 588 (E.D. Tex. 1995)("it is abundantly clear that Congress has not vested in federal district courts the power to fashion equitable removal solutions to procedural complexities.") In doing precisely that, the Fifth Circuit approved the wrongful removal of this case and encouraged other litigants to attempt the same course of action. In *Caterpillar, Inc. v. Lewis*, this Court expressly rejected the notion that defendants would improperly remove cases where a jurisdictional defect existed because the Court reasoned they would "foresee the likely outcome of an unwarranted removal – a swift and nonreviewable remand order." 519 U.S. 61, 77 (1996). Unfortunately, when the Tobacco Defendants made the very gamble this Court cautioned litigants against doing, the swift remand order was

not entered. Instead, the District Court specifically refused to make jurisdictional determinations in Petitioners second motion to remand and the Fifth Circuit carved out a new exception to the voluntary-involuntary rule to justify the inaction.

The Fifth Circuit's decision will encourage other litigants to improperly remove cases in the hopes they can convince courts to carve out exceptions to the jurisdictional requirements. This will, in all likelihood, result in increased litigation of jurisdictional matters as well as increased litigation in the federal courts. In short, allowing this decision to stand will thwart the goals of efficiency and economy and result in a waste of limited judicial resources.

III. The Fifth Circuit's Decision Conflicts with the Seventh and Eleventh Circuit's Recognition of Fraudulent Joinder as the Sole Exception to the Voluntary-Involuntary Rule

Decisions by both the Seventh Circuit and Eleventh Circuit that fraudulent joinder is the only *limited* exception to application of the voluntary-involuntary rule squarely conflict with the Fifth Circuit's new addition of improper joinder as an exception to the voluntary-involuntary rule. The Eleventh Circuit recognition of fraudulent joinder as the only exception gives effect to the policy favoring a plaintiff's right to proceed in state court. *Insigna v. LaBella*, 845 F.2d 249, 253 (11th Cir.

1988) ("There also appears to be a policy favoring a plaintiff's right, ***absent fraudulent joinder***, to determine the removability of his case.") (emphasis added). This limited exception requires:

> either that there was no possibility that the plaintiff could prove a cause of action against the resident defendant or that the plaintiff fraudulently pled jurisdictional facts in order to subject that resident defendant to the jurisdiction of the state court.

Id. at 254.

The Seventh Circuit echoed this in *Poulos v. NAAS Foods, Inc.* According to the Seventh Circuit, "the complete diversity rule and voluntary/involuntary rule make it difficult for an out-of-state (diverse) defendant to remove a case to federal court if an in-state (non-diverse) defendant has ever been a party to the lawsuit." 959 F.2d at 72-73. The Panel in *Poulos* went on to conclude the only manner in which a non-diverse defendant could remove in such a circumstance was where they met the "heavy burden" of establishing the non-diverse defendant was fraudulently joined which required showing that "after resolving all issues of fact and law in favor of the plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant." *Id.* at 73.

The relaxed standard of improper joinder set forth by the Fifth Circuit does not impose this onerous requirement on a defendant removing to a federal forum and represents a significant departure from established law on diversity jurisdiction. The conflicts between the Fifth Circuit's decision and those of the Seventh and Eleventh Circuits warrant this Court's intervention to reconcile this conflict.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted. The judgment of the court of appeals should be reversed and case remanded back to state court due to the lack of subject matter jurisdiction.

Respectfully submitted,

Charles R. Houssiere, III
Counsel of Record
Monica C. Vaughan
Houssiere, Durant & Houssiere, LLP
1990 Post Oak Blvd, Suite 800
Houston, Texas 77056
(713) 626-3700

APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED ON JANUARY 13, 2006

United States Court of Appeal
Fifth Circuit
FILED
January 13, 2006
Charles R. Fulbruge III
Clerk

In the
United States Court of Appeals
for the Fifth Circuit

Nº 04-41584

JOHNNY CROCKETT, ET AL.,
Appellants,

JOHNNY CROCKETT, INDIVIDUALLY, AND AS HEIRS TO THE ESTATE OF VERONICA FAYE CROCKETT; ANDRA KITCHEN, INDIVIDUALLY, AND AS HEIRS TO THE ESTATE OF VERONICA FAYE CROCKETT; ROBERT KITCHEN, INDIVIDUALLY, ANS AS HEIRS TO THE ESTATE OF VERONICA FAYE CROCKETT,
Plaintiffs-Appellants,

VERSUS

R.J. REYNOLDS TOBACCO COMPANY, ET AL.,
Defendants,

R.J. REYNOLDS TOBACCO COMPANY; R.J.R. NABISCO, INC.; PHILIP MORRIS USA INC.; PHILIP MORRIS COMPANIES, INC.; BROWN AND WILLIAMSON TOBACCO CORPORATION; BATUS TOBACCO SERVICES, INC.; B&W JAPAN, INC.; H.E.B. BUTT GROCERY COMPANY,
Defendants-Appellees.

Appendix A

Appeal from the United States District Court for the Southern District of Texas

---

Before GARWOOD, SMITH, and DEMOSS,
Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Johnny Crockett and other heirs of the estate of Veronica Faye Crockett (collectively "Crockett") challenge the removal to federal court of their wrongful death and survival suit against R.J. Reynolds Tobacco Company and other tobacco companies (collectively the "tobacco defendants"). Concluding that there is jurisdiction, we affirm the judgment on the merits.

I.

Crockett filed a wrongful death and survival suit against the tobacco defendants and Dr. William Peterek and the Gulf Coast Medical Group (collectively the "health care defendants") in state court seeking damages for the cancer-related death of Veronica Faye Crockett, a long-time smoker. Crockett alleges that the tobacco defendants' defective cigarettes and the health care defendants' negligence in failing to diagnose the decedent's cancer combined to cause her death.

Appendix A

Because Crockett and the health care defendants are citizens of Texas, there is not complete diversity of citizenship. Federal jurisdiction also is barred by the fact that the health care defendants are citizens of the state in which the action is brought. The tobacco defendants nevertheless removed, claiming that the non-diverse health care defendants had been fraudulently joined to defeat removal jurisdiction. The district court determined that there had been no fraudulent joinder and remanded to state court.

On remand, the tobacco defendants, over Crockett's objection, successfully moved to sever Crockett's claims against the health care defendants. Upon issuance of the severance order, the tobacco defendants again removed, arguing that the severance of the non-diverse parties cured the lack of complete diversity. Immediately after filing their notice of removal, the tobacco defendants also filed a motion for judgment on the pleadings.

Once back in federal court, Crockett moved to remand, arguing that the tobacco defendants' second attempt to remove was improper because diversity had not been created through a *voluntary act* of the plaintiffs. Instead of first ruling on Crockett's motion, the district court held against him on the merits by granting the tobacco defendant's motion for judgment

on the pleadings, then denied as moot the motion to remand.[2] Crockett appeals, claiming the district court lacked subject matter jurisdiction.

II.

"We review questions of subject matter jurisdiction *de novo*." *Bissonnet Invs., LLC v. Quinlan*, 320 F.3d 520, 522 (5th Cir. 2003). Because Crockett does not contest the district court's decision on the merits, so the only issue on appeal is whether the district court had removal jurisdiction, leading us to apply the *de novo* standard.

As a general matter,

> any civil action brought in a State court of which the district courts of the United States have original

---

[2] Although it reached the correct result, the district court should not have decided to bypass the jurisdictional question presented in the motion to remand and proceed directly to the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (rejecting the notion that a court can "assume" jurisdiction for the purpose of deciding the merits, because such an approach "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers").

> jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a). If jurisdiction is based on diversity of citizenship, however, the action is removable only if there is complete diversity and "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." *Id.* § 1441(b). If an action is not initially removable, but later becomes removable,

> a notice of removal may be filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of [diversity of citizenship] more than one year after commencement of the action.

Id.

This suit was initially nonremovable because the health care defendants were non-diverse and were citizens of Texas, in which the action was brought. The tobacco defendants argue, however, that the state court's order severing Crockett's claims against the health care defendants produced complete diversity

and obviated the "in-state defendant" barrier posed by § 1446(b). The tobacco defendants assert that a severance order qualifies as an "order or other paper from which it may first be ascertained that the case is one which . . . has become removable." § 1446(b).

Crockett contends, to the contrary, that § 1446(b) was enacted against the backdrop of, and without the intent to abrogate, the judicially-created "voluntary-involuntary" rule whereby "an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff." *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 547 (5th Cir. 1967). Because this suit became arguably removable only after the issuance of a severance order that was entered over Crockett's objection, Crockett claims removal was improper under the voluntary-involuntary rule.

The tobacco defendants counter that the voluntary-involuntary rule is inapplicable because the health care defendants were not properly-joined parties. We agree.

Courts have long recognized an exception to the voluntary-involuntary rule where a claim against a nondiverse or in-state

defendant is dismissed on account of fraudulent joinder.[3] Fraudulent joinder can be established by demonstrating either "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Travis v. Irby*, 326 F.3d 644, 646-47 (5th Cir. 2003).[4]

On the tobacco defendants' first attempt to remove, the district court, after deciding that the health care defendants had not been fraudulently joined, remanded on that basis. Crockett notes correctly that that decision is made unreviewable by 28 U.S.C. § 1447(d).[5] In addition, the severance order issued by the state court cannot be considered equivalent to a finding of

---

[3] *See, e.g., Insigna v. LaBella*, 845 F.2d 249, 254 (11th Cir. 1988) ("Fraudulent joinder is a well-established exception to the voluntary-involuntary rule.").

[4] *Accord Smallwood v. Ill. Cent. R.R.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc) (describing "the test for fraudulent joinder" and quoting *Travis*, 326 F.3d at 646-47), *cert. denied*, 125 S. Ct. 1825 (2005).

[5] Section 1447(d) states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise" (adding an exception not relevant here).

actual fraud in the pleadings or an inability of the plaintiffs to establish a cause of action against the health care defendants. Rather, that order merely established that Crockett's claims against the health care defendants should be tried in separate suits. Crockett elected not to appeal that ruling. Fraudulent joinder is therefore no longer an issue in this case.

A party, however, can be improperly joined without being fraudulently joined. Under federal law, defendants are properly joined if (1) "there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences" and (2) "any question of law or fact common to all defendants will arise in the action." FED. R. CIV. P. 20(a). Texas has adopted the same requirements for proper joinder. *See* TEX. R. CIV. P. 40(a). If these requirements are not met, joinder is improper even if there is no fraud in the pleadings and the plaintiff does have the ability to recover against each of the defendants.[6]

The state court severed Crockett's claims against the health care defendants from his claims against the tobacco defendants because "the medical negligence and malpractice claim and the

---

[6] *Cf. Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996).

burden of proof to sustain [that] claim is totally different [from] the burden of proof . . . necessary to secure judgment for product liability."[7] To the extent the severance decision was tantamount to a finding of improper joinder, we agree with that finding.

The fraudulent joinder exception to the voluntary-involuntary rule is designed to prevent plaintiffs from blocking removal by joining nondiverse and/or in-state defendants who should not be parties. That salutary purpose is also served by recognizing an exception to the voluntary-involuntary rule where defendants are improperly, though not fraudulently, joined. We therefore conclude that removal on the basis of an unappealed severance, by a state court, of claims against improperly joined defendants is not subject to the voluntary-involuntary rule.[8] Accordingly, removal jurisdiction existed in this case upon the severance of Crockett's claims against the

---

[7] *Crockett v. R.J. Reynolds Tobacco Co.*, No. 03CV1391 (10th Dist. Ct., Galveston County, Tex., Aug. 18, 2004) (transcript of hearing on defendants' motion to sever).

[8] This conclusion finds support the text of § 1441(b), which does not refer to "nonfraudulently joined" parties. Rather, it blocks removal only where "properly joined" defendants are citizens of the state in which the action is brought.

nondiverse in-state health care defendants.

III.

Crockett has not challenged the district court's disposition on the merits. Accordingly, because we conclude that the district court had subject matter jurisdiction, its judgment granting the motion for judgment on the pleadings, denying (as moot) the motion to remand, and dismissing all claims with prejudice, is AFFIRMED.

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION DATED AND ENTERED OCTOBER 13, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-04-505

JOHNNY CROCKETT, ANDRA KITCHEN,
and ROBERT KITCHEN,
Plaintiffs

v.

R.J. REYNOLDS TOBACCO COMPANY, et al,
Defendants

ORDER GRANTING DEFENDANTS' RULE 12 (C) MOTION FOR JUDGMENT ON THE PLEADINGS AND DENYING PLAINTIFFS' MOTION TO REMAND AS MOOT

I.

This tobacco products liability case comes before the Court on removal from the 10th Judicial District Court of Galveston County, Texas. Now before the Court are Plaintiffs' Motion to Remand and Defendants' Motion for Judgment on the Pleadings. For the reasons set forth below, the Court **GRANTS** Defendants' Motion for Judgment on the Pleadings and **DENIES** Plaintiffs' Motion to Remand as Moot.

Appendix B

II. Background

Veronica Faye Crockett, wife of Plaintiff Johnny Crockett and mother of Plaintiffs Andra Kitchen and Robert Kitchen (collectively, "Plaintiffs"), began smoking in about 1969. Plaintiffs allege that she tried to quit smoking but could not due to the addictive nature of cigarettes. In 2002, she was diagnosed with an advanced stage of lung cancer. She died in December 2002.

Plaintiffs brought suit in state court in August 2003 against R.J. Reynolds Tobacco Company, RJR Nabisco, Inc., Philip Morris Incorporated, Philip Morris Companies, Inc., Brown and Williamson Tobacco Corporation, Batus Tobacco Services, Inc., B & W (Japan), Inc., and Chevron USA Inc., (collectively "Defendants"), as well as H.E.B. Grocery ("H.E.B.") and Veronica Crockett's physicians, William Peterek, M.D. and the Gulf Coast Medical Group (collectively, "Health Care Defendants"). Defendants removed the case to this Court in February 2004, alleging that Plaintiffs had fraudulently joined the Health Care Defendants, who were Texas residents. This Court remanded the case on May 25, 2004, finding that the Health Care Defendants had not been fraudulently joined. Plaintiffs then voluntarily dismissed cigarette retailer H.E.B., a Texas corporation. The state court also granted Defendants' Motion for Severance as to the Health Care Defendants.

Defendants immediately again removed the case to this Court because all non-diverse parties had been removed from the case.

Plaintiffs assert claims of wrongful death and survival based on theories of strict liability, breach of implied warranty of fitness, breach of implied warranty of merchantability, negligence, gross negligence, and *res ipsa loquitur*.

III. Analysis

This Court will consider the Motions in the order received. Therefore, the Defendants' Rule 12(c) Motion for Judgment on the Pleadings will be considered first. As the Court's actions on that Motion disposes of the case, the Court does not reach the merits of the Plaintiffs' Motion for Remand.[1]

---

[1]This Court's decision on the Defendants' Motion assumes that the case is properly before the Court. Plaintiffs argue that Defendants improperly removed the case. Defendants may only remove a case to federal court when it could have originally been filed in federal court or when, by voluntary act of the plaintiff, the case becomes removeable. See 28 U.S.C. § 1441(a); *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 546 (5th Cir. 1967). Since Plaintiffs opposed the severance of the non-diverse defendants by the state court, this case did not become removeable by voluntary act of the Plaintiffs. *See Miller v. Fulton*, 113 F. Supp.2d 1035 (S.D. Miss. 2000). However, the Court does not reach these arguments made in the Motion for Remand. Plaintiffs may of course pursue this line of argument on appeal.

Appendix B

Fed. R. Civ. P. "12(b)(6) decisions appropriately guide the application of 12(c) because the standards for motions under both rules are the same." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 n.8 (5th Cir. 2002). This Court must accept all well-pleaded facts as true and view them in the light most favorable to Plaintiffs. *See Fee v. Herndon*, 900 F.2d 804, 807 (5th Cir. 1990). In order to grant Defendants' Motion, "[i]t must appear to a certainty that the plaintiffs can prove no set of facts in support of their claims that would entitle them to relief." *Id.*

Defendants argue that decisions of the Fifth Circuit have so completely foreclosed Plaintiffs' action for damages due to cigarette smoking that Plaintiffs can prove no set of facts that would entitle them to relief. They cite numerous cases holding that Tex. Civ. Prac. & Rem. Code §§ 82.001-04, adopted in 1993, bars all actions for damages based on both the health risks of cigarettes and the consequences of addiction. Plaintiffs point to *American Tobacco Company v. Grinnell*, 951 S.W.2d 420 (Tex. 1997). In that case, the Texas Supreme Court held that, as of 1952, "the general ill-effects of smoking were commonly known" but that the defendants did not establish common knowledge of the "addictive quality of cigarettes" at the time in question, and therefore claims based on the latter were not barred as a matter of law. *Id.* at 428. That court did not interpret §§ 82.001-04 because the case arose before the

enactment of that law. Here, no party disputes the applicability of that law.

> § 82.001 defines "products liability action" as
>
> > any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories.

Tex. Civ. Prac. & Rem. Code § 82.001. This definition expressly includes Plaintiffs' claims against Defendants, who are either manufacturers or sellers.

§ 82.004 states that no manufacturer or seller shall be liable in a products liability action on an inherently unsafe product when the dangers of that product are common knowledge and the product is "a common consumer product intended for personal consumption, such as ... tobacco." Tex. Civ. Prac. & Rem. Code § 82.004. Plaintiffs argue that since *Grinnell* established common knowledge of the health risks but not the addictive quality of cigarettes, only claims based on the former

are barred as a matter of law. However, the Fifth Circuit has decided that the addition of §§ 82.001-04 superseded the decision in *Grinnell*. *See Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263, 268 (5th Cir. 2001); *Hughes v. Tobacco Institute, Inc.*, 278 F.3d 417, 421-22 (5th Cir. 2001); *Harris v. Phillip Morris Inc.*, 232 F.3d 456, 458-59 (5th Cir. 2000); *Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486, 490-91 (5th Cir. 1999). In *Sanchez*, the court found that *Grinnell* did not control interpretation of § 82.004. *Sanchez*, 187 F.3d at 490. It also held that the finding in *Grinnell* of common knowledge of th health risks of cigarettes satisfied the entire common knowledge requirement of § 82.004, so defendants did not need to establish common knowledge of the addictive quality of cigarettes to receive protections of § 82.004. *Id.* at 490-91.

In diversity cases, the federal district court must apply the law of the state in which it is located. *Erie R.R. Co. v. Thompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). Typically, this means the district court applies the state law as interpreted by that state's highest court. *See Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992). In the absence of a ruling by that court, the district court must determine what the state's highest court would likely do. *Id.* When the Court of Appeals for the circuit encompassing the district court has already interpreted the state law, the district court must follow

that interpretation unless a state court decision or statutory amendment supersedes the Court of Appeals opinion. *See Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 747 (5th Cir. 1995); *see also Hughes*, 278 F.3d at 421.

The Texas Supreme Court has not issued an opinion interpreting § 82.001-04. The Court of Appeals for the Fifth Circuit has issued several opinions interpreting this law. The Fifth Circuit has gone so far as to state that it considers its decisions in these cases "to be settled law in this Circuit as to the applicability and interpretation of § 82.004 in regard to tobacco being an inherently unsafe product, and further appeals may be deemed frivolous by this Court." Hughes, 278 F.3d at 425-26. This Court must follow the Fifth Circuit interpretation until such time as the Texas Supreme Court might reconsider the issue. Therefore, Plaintiffs' claims fail as a matter of law.

IV. Conclusion

For the reasons stated above, Defendants' Motion for Judgment on the Pleadings is **GRANTED** and Plaintiffs' Motion for Remand is **DENIED AS MOOT**. Each party is to bear its own taxable costs and expenses incurred herein to date.

Appendix B

IT IS SO ORDERED.

DONE this 13th day of October, 2004, at Galveston, Texas.

s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

APPENDIX C – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND ENTERED FEBRUARY 10, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 10, 2006
Charles R. Fulbruge III
Clerk

No. 04-41584

JOHNNY CROCKETT, ET AL

Plaintiffs

JOHNNY CROCKETT, Individually, and as Heirs to the Estate of Veronica Faye Crockett; ANDRA KITCHEN, Individually, and as Heirs of the Estate of Veronica Faye Crockett; ROBERT KITCHEN, Individually, and as Heirs of the Estate of Veronica Faye Crockett

Plaintiffs - Appellants

v.

R J REYNOLDS TOBACCO COMPANY, ET AL

Defendants

R J REYNOLDS TOBACCO CO; R J R NABISCO INC; PHILIP MORRIS USA, INC; PHILIP MORRIS COMPANIES INC; BROWN & WILLIAMSON TOBACCO CORPORATION; BATUS TOBACCO SERVICES INC; B&W JAPAN INC; HEB BUTT GROCERY COMPANY

Defendants - Appellees

Appendix C

Appeal from the United States District Court for the
Southern District of Texas, Galveston

ON PETITION FOR REHEARING

Before GARWOOD, SMITH and DeMOSS, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

s/ Jerry Smith
United States Circuit Judge

REHG-2

APPENDIX D – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC DATED AND ENTERED FEBRUARY 7, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-41584

JOHNNY CROCKETT, ET AL

Plaintiffs

JOHNNY CROCKETT, Individually, and as Heirs to the Estate of Veronica Faye Crockett; ANDRA KITCHEN, Individually, and as Heirs of the Estate of Veronica Faye Crockett; ROBERT KITCHEN, Individually, and as Heirs of the Estate of Veronica Faye Crockett

Plaintiffs - Appellants

v.

R J REYNOLDS TOBACCO COMPANY, ET AL

Defendants

R J REYNOLDS TOBACCO CO; R J R NABISCO INC; PHILIP MORRIS USA, INC; PHILIP MORRIS COMPANIES INC; BROWN & WILLIAMSON TOBACCO CORPORATION; BATUS TOBACCO SERVICES INC; B&W JAPAN INC; HEB BUTT GROCERY COMPANY

Defendants - Appellees

Appendix D

Appeal from the United States District Court for the Southern District of Texas, Galveston

---

ON PETITION FOR REHEARING EN BANC

(Opinion 1/13/06, 5 Cir., _____, _____ F.3d _____)

Before GARWOOD, SMITH, and DeMoss, Circuit Judges.

PER CURIAM:

(X) No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (F ED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

Appendix D

ENTERED FOR THE COURT:

s/ Jerry Smith
United States Circuit Judge

Judges Barksdale, Benavides, and Clement did not participate in the consideration of the rehearing en banc.

REHG-6a

APPENDIX E – STATUTES INVOLVED

28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between--

(1) Citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $ 75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title--

> **(1)** a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any

Appendix E

State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) *Omitted as not pertinent to the issues in this case*

(e) *Omitted as not pertinent to the issues in this case*

Appendix E

28 U.S.C. § 1446

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty

days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(c) (1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a wavier of such grounds, and a second notice may be filed only on grounds not

existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an

> evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect removal and the State court shall proceed no further unless and until the case is remanded.

(e) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

(f) With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such

counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.